Tropical Network Sdn Bhd v Geo-Chem Inspection (M) Sdn Bhd (FIMA Bulking Services Bhd, third party)

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO MT5–22–896 OF 2007
SUPANG LIAN JC
30 MARCH 2010

Contract — Breach — Breach of duty — Breach of Malaysian Palm Oil Board Rules — Failure of licensed surveyor to supervise loading of liquid cargo onto vessel — Whether failure to properly supervise caused contamination of cargo — Whether breach of contract established

Tort — Negligence — Breach of duty — Breach of Malaysian Palm Oil Board Rules — Failure of licensed surveyor to supervise loading of liquid cargo onto vessel — Whether failure to properly supervise caused contamination of cargo — Whether breach of duty of care established — Several persons not acting in concert committing tort causing same or indivisible damage — Whether each tortfeasor liable for whole damage

The plaintiff intended to ship a consignment of a type of liquid alcohol to their customer in Thailand. The cargo was stored at the third party's shore tank No 56 at Port Klang and was later loaded onto the vessel MT Trans Rayong. As per the requirement of the Malaysian Palm Oil Board (MPOB), the plaintiff appointed the defendant, a licensed surveyor, to supervise the loading of the cargo. Upon completion of the loading, DW7 (the defendant's attending surveyor) had carried out volume gauging onboard the vessel and found that the quantity had increased to about 843 MT. This was an excess of about 43 MT from the original volume. DW7 therefore issued a notice of protest to the vessel. The third party then investigated the additional quantity and found that it was 38.14 MT of a liquid chemical known as C14 Myristic Acid that was mistakenly pumped into tank No 56 via the inlet valve of the tank. This had occurred during the loading of the cargo from the tank into the vessel. Whilst the third party admitted responsibility for the contamination, it claimed that the defendant was also partly to be blamed because it was the defendant's duty as surveyor to ensure that all the valves on tank 56, except for the valve for the loading line to the vessel, were locked and sealed. It was found that DW7 had not sealed any valve on tank 56 and did not check whether the valves were in open or close position. As a result of the contamination, the plaintiff's customer in Thailand rejected the cargo and the plaintiff had to provide them with replacement cargo. The plaintiff therefore claimed for all losses incurred. The following issues arose for determination: (i) whether the breach had caused

the contamination; and (ii) the extent of each party's contribution to the contamination.

Held, allowing the plaintiff's claim against the defendant with costs and allowing the defendant's claim against the third party in part.

(1) Under the MPOB rules, the defendant had a duty to ensure that all related valves, except the valves meant for the loading line, were closed and sealed before commencing loading. The defendant's failure to comply with the MPOB rules constituted a breach of duty of care in contract and in tort. The defendant was therefore liable for the contamination that ensued (see para 80–82).

(2) The defendant and the third party were equally blameworthy. The third party had negligently used the wrong discharge pump and had failed to close the inlet valve. The defendant could have prevented the occurrence if the defendant had inspected the inlet valve and sealed it. Where each of several persons, not acting in concert commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the whole damage. Thus, all that the plaintiff had to prove was some negligence against the defendant to recover 100% of its claim. Since the plaintiff had proved negligence and breach of contractual duties on the part of the defendant, the plaintiff could recover its claim against the defendant based on 100% (see para 85–86).

(3) In relation to the defendant's claim against the third party, since both were equally to be blamed, the apportionment between them was to be made based on the total loss suffered by the plaintiff less the mitigated amount, if any (see para 87).

[Bahasa Malaysia summary

Plaintif mahu menghantar satu konsainmen sejenis alkohol cecair kepada pelanggan mereka di Thailand. Kargo tersebut disimpan di pesisiran pihak ketiga dalam tangki bernombor 56 di Pelabuhan Klang dan kemudiannya dipunggah ke atas kapal MT Trans Rayong. Menurut keperluan Malaysian Palm Oil Board (MPOB), plaintif melantik defendan, juruukur berlesen, untuk menyelia pemunggahan kargo tersebut. Setelah siap memunggah, DW7 (juruukur pengiring defendan) tolok isi padu ke atas kapal tersebut dan mendapati bahawa kuantitinya telah bertambah kepada kira-kira 843MT. Ini adalah berlebihan sebanyak 43MT daripada isi padu asal. DW7 kemudiannya mengeluarkan notis bantahan kepada kapal tersebut. Pihak ketiga kemudiannya menyiasat kuantiti tambahan tersebut dan mendapati bahawa 38.14MT bahan kimia cair yang dikenali sebagai C14 asid miristik yang telah tersilap dipamkan ke dalam tangki bernombor 56 menerusi injap salur masuk tangki tersebut. Ini berlaku semasa pemunggahan kargo tersebut dari tangki ke

kapal. Walaupun pihak ketiga mengakui bertanggungjawab ke atas pencemaran tersebut, ia mendakwa bahawa defendan juga harus dipersalahkan kerana menjadi tanggungjawab defendan sebagai juruukur untuk memastikan bahawa kesemua injap tangki 56, kecuali injap saluran pemunggahan ke kapal tersebut, ditutup dan dikunci. Didapati bahawa DW7 tidak menutup mana-mana injap di tangki 56 dan tidak memeriksa sama ada injap tersebut terbuka atau tertutup. Akibat daripada pencemaran tersebut, pelanggan plaintif di Thailand menolak kargo tersebut dan plaintif perlu menggantikan kargo tersebut. Oleh itu plaintif menuntut semua kerugian yang dialami. Isu-isu berikut berbangkit untuk dipertimbangkan: (i) sama ada pelanggaran tersebut telah mengakibatkan pencemaran itu; dan (ii) takat sumbangan pihak-pihak terhadap pencemaran itu.

Diputuskan, membenarkan tuntutan plaintif terhadap defendan dengan kos dan membenarkan sebahagian tuntutan defendan terhadap pihak ketiga.

(1) Di bawah peraturan-peraturan MPOB, defendan bertanggungjawab memastikan semua injap yang berkaitan, kecuali injap untuk saluran pemunggahan, ditutup dan dikunci sebelum memulakan pemunggahan. Kegagalan defendan untuk mematuhi peraturan-peraturan MPOB adalah melanggar kewajipan berjaga-jaga dalam kontrak dan tort. Defendan bertanggungan ke atas pencemaran yang berlaku (lihat perenggan 80–82).

(2) Defendan dan pihak ketiga sama-sama bersalah. Pihak ketiga telah dengan cuai menggunakan pam luahan dan gagal menutup injap salur masuk. Defendan boleh menghalang kejadian tersebut jika ia memeriksa injap salur masuk dan menutupnya. Apabila setiap daripada beberapa orang, tidak bertindak secara bersesama melakukan tort terhadap orang lain secara substansial pada masa yang sama dan menyebabkan kerosakan yang sama atau tidak terbahagikan, setiap pelaku tort bertanggungjawab ke atas kesemua kerosakan. Oleh itu, apa yang plaintif harus buktikan ialah kecuaian di pihak defendan untuk mendapat 100% tuntutannya. Memandangkan plaintif telah membuktikan kecuaian dan pelanggaran kewajipan kontraktual di pihak defendan, plaintif boleh mendapatkan tuntutannya terhadap defendan atas dasar 100% (lihat perenggan 85–86).

(3) Berkaitan tuntutan defendan terhadap pihak ketiga, disebabkan kedua-duanya sama bersalah, pembahagian antara mereka dibuat berdasarkan jumlah kerugian yang dialami plaintif, ditolak jumlah pengurangan, jika ada (lihat perenggan 87).]

Notes

For cases on breach of duty, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2597–2598.

For cases on breach of duty under negligence, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 831–837.

Cases referred to

Alan Thomas Bohlsen v Draftworldwide Sdn Bhd [2009] 8 MLJ 461, HC (refd)
Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567, CA (refd)
BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1978) 52 ALJR 20, PC (refd)
Dingle v Associated Newspapers Ltd & Ors [1961] 2 QB 162 (refd)
Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (sued as a firm) & Ors [1997] 3 MLJ 546; [1999] 8 CLJ 131, HC (refd)
Drinkwater & Anor v Kimber [1932] QB 281, CA (refd)
Oli Mohamed v Keith Murphy & Anor [1969] 2 MLJ 244 (refd)
Public Prosecutor v Abang Abdul Rahman [1982] 1 MLJ 346 (refd)
Swamy v Mathews & Anor [1968] 1 MLJ 138, FC (refd)

Legislation referred to

Evidence Act 1950 s 45, 103, 114(g)

R Jayabalan (N Jegathesan with him) (John Ang & Jega) for the plaintiff.
Oon Thian Seng (TS Oon & Partners) for the defendant.
Rizal (Rizal & Co) for the third party.

Supang Lian JC:

INTRODUCTION

[1] Tropical Network Sdn Bhd ('plaintiff') had a consignment of 800.39 MT of Lorol C12-14MY, a liquid alcohol derived from palm oil, that they intended to ship to a customer in Thailand. The cargo was stored at the bulking terminal of Fima Bulking Services Bhd ('third party') at Port Klang in their shore tank No 56. On 15 December 2006 the cargo was loaded onto the vessel MT Trans Rayong that was berthed at wharf 23 at Port Klang. It is a requirement of the Malaysian Palm Oil Board ('MPOB') that the plaintiff should appoint a licensed surveyor to supervise the loading of the cargo. Hence, the loading was made under the supervision of Geo-Chem Inspection (M) Sdn Bhd ('defendant') that had been appointed by the plaintiff to act as surveyors. The loading started at 11.05am and completed at 5pm. The defendant's attending surveyor was Mr Steven Ong ('DW7') and one Mr Saravanan assisted him. After completion of the loading, DW7 carried out volume gauging onboard the vessel and found that the quantity had increased to about 843 MT, which is an excess of about 43 MT from the original volume. He then issued a notice of protest to the vessel. The vessel nonetheless left port at about 6.30 in the

evening of the same day with the excess quantity. At that stage, it was not yet known that apart from the quantity, the cargo's quality was compromised.

[2] The same evening, the third party carried out investigations on the source of the additional quantity. They found out it was 38.14 MT of a liquid chemical known as C14 myristic acid that was mistakenly pumped into tank No 56 via the inlet valve of the tank. This occurred at 11.53am at the time when the loading from the tank into the vessel was ongoing. The plaintiff was informed of the contamination and the vessel that was on its way to Thailand was recalled to Port Klang. The vessel reached port at 8 o'clock on the morning of 16 December 2006. A meeting was convened the same day at 11.20am between all the parties to investigate the contamination. The minutes of this meeting are at pp 79–81 of bundle C (agreed on authenticity but subject to cross-examination). At the meeting, the third party through their representative Mr Aslam Haroon admitted that the third party was responsible for the contamination but insisted that the defendant was also partly to blame. Mr Thiyagarajah ('DW1') representing the defendant acknowledged that it was the duty of the defendant as surveyor to check that all the valves on tank 56, except for the valve for the loading line to the vessel, were locked and sealed. As well, he confirmed that the surveyor Mr Steven Ong (DW7) did not seal any valve on tank 56 and did not check whether the valves were in open or close position. With that confirmation, Mr Aslam opined that the defendant was jointly responsible with the third party for the contamination.

[3] Because of the contamination, the consignment was no longer acceptable to the plaintiff's customer in Thailand. The plaintiff perforce had to purchase replacement cargo that they subsequently sent to their customer.

THE CAUSE OF THE CONTAMINATION

[4] The cause of the contamination is not in dispute. Fima Bulking Services has 72 storage tanks at the bulking terminal. Two of these are of concern to us and they are shore tanks No 56 and No 71. The Lorol cargo of the plaintiff was stored in shore tank 56. The day before the loading of the cargo onto the MT Trans Rayong, the terminal had arranged to receive an additional parcel of about 52 MT of Lorol C12–14MY. It was to be discharged into shore tank 56. A tanker truck arrived at the terminal on the morning of 14 December 2006 with this additional cargo. According to Haji Md Nor bin Md Taib ('TPW1'), the general manager of the third party, to discharge this single parcel into shore tank 56 the terminal attendant used discharge pump No D7. This pump was last used to discharge a consignment of myristic acid into shore tank 71. Hence, the terminal's pump attendant had to reset it to discharge the additional cargo of Lorol into tank 56. The discharge of the additional Lorol into tank 56 was

completed the same day. However, upon completion, the pump attendant did not take out the discharge pump from the reception line of tank 56. Neither did he close the inlet valve of tank 56.

[5] The next day of 15 December, the loading operations of the Lorol cargo from shore tank 56 commenced at 11.05am. In the middle of the loading, a consignment of 38.140 MT of myristic acid arrived at the terminal by road tanker. The myristic acid was meant to be discharged into tank 71. The terminal attendant, however, proceeded to use discharge pump D.7 to discharge the myristic acid from the road tanker. Since the pump was still connected to tank 56 and the inlet valve of tank 56 was not closed, the myristic acid went instead into tank 56 containing the cargo of Lorol, which at that time was being pumped into the MT Trans Rayong. Hence, the increase in the volume of the cargo of Lorol as DW7 later discovered and its contamination.

THE PLAINTIFF'S CLAIM AGAINST THE DEFENDANT

[6] The plaintiff said that it had purchased the replacement cargo at a higher price and incurred additional expenses for the shipment. This constituted a loss amounting to RM3,282,194.95 for them. Nonetheless, the plaintiff was able to sell the contaminated cargo for RM1,450,258.35. Moreover, the third party through their insurers had paid RM1,130,854.59 to the plaintiff as damages for their liability towards the loss suffered and the plaintiff had accepted the sum as full satisfaction of the liability of the third party. The plaintiff's claim against the defendant was for the balance of RM701,082.01 together with general damages, interest, and costs. It is the case for the plaintiff that the defendant contributed to the contamination of the cargo by failing to check the open/close position of all the valves on tank 56 and then failing to close and seal all those valves before the loading except the valves meant for the loading line. The plaintiff contended that such failure on the part of the defendant was a breach of their contractual duties as well as being negligent in carrying out their duties. The cause of action of the plaintiff was therefore founded in both contract and the tort of negligence.

THE DEFENCE OF THE DEFENDANT

[7] The defendant's case was that the contamination of the cargo was caused solely by the negligence of the terminal by wrongly discharging the myristic acid into shore tank 56. They contended that it was not within their scope of obligation to be responsible for the pipeline or valve setting of the terminal's pipeline or shore tanks and the same are managed and controlled by the terminal. Further, it is not within their obligation under the agreement to close or seal all or any valve of shore tanks at the terminal (including shore tank 56) before, during or after loading operations. In any case, the defendant had sealed

all the vessel's cargo tanks with the defendant's lead seals and had taken all precautions necessary. Furthermore, it had observed and complied with the standard industry practice and had exercised due care and skill when performing its services under the agreement.

THE CLAIM OF THE DEFENDANT AGAINST THE TERMINAL

[8] The defendant alleged that the third party by their negligence had caused the contamination of the plaintiff's cargo. The defendant has set out in detail the particulars of the alleged negligence of the third party in para 7 (a) – (p) of the statement of claim of the defendant against the third party (see pp 22–29 of bundle b). Furthermore, the third party had expressly admitted that they are liable for the contamination of the cargo and had compensated the plaintiff in the sum of RM1,130,854.59 for their alleged loss. Hence, the defendant sought to be indemnified by the third party for whatever sums they were found liable to pay to the plaintiff together with costs and other reliefs ordered to be paid by the defendant to the plaintiff.

THE DEFENCE OF THE THIRD PARTY

[9] It said that being the terminal operator it acted only as a conduit pipe to facilitate the transfer of the plaintiff's cargo to the vessel. It is not 100% liable for the contamination as the defendant, being the appointed surveyor, held a higher duty of care to properly supervise the loading of the cargo. The failure on the defendant's part to check whether the valve at shore tank 56 had been closed and sealed had contributed to the contamination of the cargo. Further, the defendant knew that the plaintiff had issued a discharge of liability letter to the third party in consideration of discharged the third party had plaintiff had agreed to discharge the third party from all liability and claims in respect of the loss incurred by the plaintiff in consideration of the payment of RM1,130,854.59. This payment to the plaintiff, was made without prejudice and without admission of liability. As such, the claim of the defendant against the third party should be dismissed with costs.

THE ACTION IN CONTRACT AND NEGLIGENCE

[10] As earlier stated, the action of the plaintiff against the defendant is founded on breach of contract and on the tort of negligence. With regard the contractual relationship between the plaintiff and the defendant, it is derived from the telefax transmission of 14 December 2006 (exh P1 (at pp 150–152 of bundle C)) from the plaintiff to the defendant appointing the defendant as surveyor. The contract was for the defendant to provide surveying services for the discharge of the cargo from shore tank 56 to the vessel. The contentions of

the plaintiff on the breach of contract are these:

(a) the terms of the contract are that the defendant was to ensure that the quantity and quality of the cargo was not compromised during the discharge;

(b) to ensure that the quality and quantity was not compromised during the discharge from the tank, the defendant must carry out the survey in accordance with the Malaysian Palm Oil Board (Licensing) Rules 2005 and the standard surveying procedures and practices for palm oil and its derivatives issued by the Malaysian Palm Oil Board (the MPOB Rules);

(c) the defendant's conduct before, during and after the loading operation was in violation of the MPOB Rules. In particular, the defendant had failed to check the open/close position of all the valves on tank 56 and then failed to close and seal all those valves before the loading except the valves meant for the loading line; and

(d) the failure to comply with the Rules caused the quantity and quality to be compromised which constitutes a breach of contractual duties.

[11] These contentions are not within any express and specific condition in the letter of appointment of 14 December 2006. As such, the plaintiff would have to rely on the legal concept of there being implied terms (see *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (sued as a firm) & Ors* [1997] 3 MLJ 546; [1999] 8 CLJ 131). In *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1978) 52 ALJR 20 Lord Simon in the Privy Council spelled out the conditions for a term to be implied:

> In Their [Lordships'] view, for a term to be implied, the following conditions must be satisfied: it must be reasonable and equitable; it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; it must be capable of clear expression; it must not contradict any express term of the contract.

[12] It is not difficult to discern the implied terms of the contract in this case. In the first place, it is not in dispute that the defendant is a company licensed by the Malaysian Palm Oil Board (MPOB) to act as surveyors in the import and export of palm oil and palm oil based products. Neither is it in dispute that the appointment of the defendant of 14 December 2006 was pursuant to the requirement of the MPOB that a licensed surveyor be appointed to supervise the export of palm oil based products and the appointment. From these facts, quite clearly, the defendant was hired specifically to provide surveying services for the discharge of the Lorol cargo from shore tank 56 to the vessel. In light that the defendant was to supervise the discharge of the cargo, it is reasonable and necessary to give business efficacy to the contract for a term to be implied that the quantity and quality of the cargo will not be compromised whilst

under their supervision. Furthermore, it is common ground (see para 6 of the statement of agreed facts (bundle k)) that the defendant's scope of work under the appointment requires the survey to be carried out according to the procedures as stated in the MPOB Rules. It therefore goes without saying that it is an implied term of the contract that to ensure that the quality and quantity of the cargo is not compromised, the defendant was to comply with the MPOB Rules in carrying out the survey. Once it is proved by evidence that the defendant had not carried out the survey in accordance with the MPOB Rules and that failure caused the quantity and quality of the cargo to be compromised, liability in contract against the defendant would be established.

[13] As to the cause of action in negligence, to make out a case against the defendant, the plaintiff must establish four ingredients namely:

(a) that the defendant owed them a duty to take reasonable care;

(b) that the defendant breached that duty;

(c) that the breach caused the harm in question; and

(d) that the plaintiff suffered damage that is not too remote (see *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567 (CA) at p 578A-C).

With regard the standard of care expected of the defendant it is as stated by Barakbah LP in *Swamy v Mathews & Anor* [1968] 1 MLJ 138 at p 139G-I that:

> A man or a woman who practices a profession is bound to exercise the care and skill of an ordinary competent practitioner in that profession — be it the profession of an accountant, a banker, a doctor, a solicitor or otherwise. In the case of *Lanphier v Phipos* Tindal CJ laid down the principle:
>
> Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest degree of skill. There may be persons who have higher education and greater advantages than he has; but he undertakes to bring a fair, reasonable and competent degree of skill.

[14] The contention of the plaintiff was that the defendant had a duty to exercise a reasonable degree of care, skill, diligence or competence in carrying out the supervision or survey. However, in breach of that duty of care the defendant whilst carrying out the survey had failed to check the open/close position of all the valves on tank 56 and then failed to close and seal all those valves before the loading except the valves meant for the loading line. That failure caused harm to the plaintiff in that the cargo was contaminated and in consequence, the plaintiff suffered damages and incurred loss when they had to purchase replacement cargo that they then had transported to their customer.

THE ISSUES FOR TRIAL

[15] Be that as it may, the trial before me was on the basis that it was to determine liability only. For that end, the parties (the plaintiff, the defendant and the third party) have come to agreement on the issues to be tried which they had formulated thus (see bundle L — 'issues to be tried'):

> Who is liable? Whether it was the duty of the Defendant to check and confirm whether all valves on tank 56 were in open or close position and whether the Defendant was in a position to close and seal all the valves on tank 56 before the loading and if so; whether the Defendant by failing to check and confirm whether all valves on tank 56 were in open or close position and by failing to close and seal all the valves on tank 56 before the loading except the valves meant for the loading line, has contributed to the contamination or the Third Party?

[16] Going by the issues formulated by the parties, quite clearly there was no dispute that the defendant owed a duty of care in contract and in tort to the plaintiff in carrying out the survey or supervision of the loading of the plaintiff's cargo. In addition, the line of defence of the defendant and that of the third party in their pleadings indicate that they do not dispute the duty of care in tort and in contract. Their dispute was with regard the breach of that duty; whether the breach has caused the contamination and the extent of each other's contribution to the contamination. Going therefore by the pleadings, the agreed issues for trial and evidence adduced the issues for the court were:

(a) Whether the duty of care in contract and in tort imposes an obligation on the defendant to do as follows:

  (i) to check and confirm whether all the valves on tank 56 were in open or close position and

  (ii) to ensure that before loading, all the valves, except for the valves meant for the loading line, were closed and seal;

(b) if the defendant was under such obligation, whether their failure to check and confirm whether all valves on tank 56 were in open or close position and their failure to close and seal all the valves except the valves meant for the loading line had contributed to the contamination and

(c) what was the extent of the contribution and therefore the blameworthiness of the defendant and the third party in causing the contamination.

Issue (c) essentially involved apportioning liability between the defendant and the third party.

Obligation to check and confirm valves were closed or open and to ensure all valves were sealed and closed before loading (except for the valves for the loading line)

[17] It was the case for the plaintiff and the third party that the issue of whether the defendant was under such obligation in carrying out the survey depends on whether the MPOB Rules require the latter to do so. It is common ground that the defendant's scope of work under the appointment required the survey to be carried out in accordance with the procedures as stated in the MPOB Rules (see para 6 of the statement of agreed facts (bundle k)). PW3, an officer of the Enforcement and Licensing Division of MPOB confirmed as much when she testified that a licensed surveyor such as the defendant must comply with the MPOB Rules when carrying out survey. That being the case the applicability of the MPOB Rules was beyond question.

[18] The plaintiff referred to the following provisions of the MPOB Rules:

Clause 1. SCOPE

This standard procedure covers the surveyor's operational procedures on the survey of palm oil products and its derivatives. The term survey means inspecting, measuring, conducting sampling or superintending any activity relating to any movement or handling of palm oil and its derivatives.

Clause 4. STANDARD SHORE SURVEY PROCEDURES AND DOCUMENTATION

4.1 Quantity Survey and Tank inspection

4.1.1 The following tasks shall be performed in the presence of the installation's representative and a Customs officer before the arrival of the vessel.

4.1.2 The pipeline loading and discharging valves and other related inlet and outlet valves shall be sealed excluding the top outlets before the volume gauging and sampling if practical or case to case basis. The manhole covers shall be sealed upon completion of the task.

Clause 5. STANDARD SURVEY PROCEDURES AT THE INSTALLATION (before, during and after loading)

Clause 5.1 Before Loading

5.1.1 Inspect the shore tank pipeline valves, manhole covers and other related and unrelated inlet and outlet valves sealed after the volume gauging and sampling, to ensure that the surveyor's seals have not been tampered with.

[19] The MPOB Rules do not define 'related inlet' or 'outlet valves' but we have the undisputed evidence of PW3 that 'related inlet and outlet valves' are the valves connected directly to the shore tank. As for inlet valves she said those are by which the cargo is pumped into the tank whereas outlet valves are those by which the cargo is discharged from the tank. On what constitute 'unrelated pipeline valves', she said they are not connected directly to the shore tank but if they are not closed, the possibility of cross-contamination is still there. To my mind, giving cll 4, 4.1, 4.1.1 and 4.1.2 their ordinary plain meaning they clearly impose a duty on the attending surveyor during the quantity survey and tank inspection to seal the pipeline loading and discharging valves and other related inlet and outlet valves (excluding the top outlets) before carrying out the volume gauging and sampling. This necessarily means that the surveyor can only carry out volume gauging and sampling after he had sealed all these afore-mentioned valves.

[20] The plain meaning of cl 5.1.1 on the other hand requires that after the volume gauging and sampling is done and before the loading can commence, the surveyor is to inspect the shore tank pipeline valves, the manhole cover and other related and unrelated inlet and outlet valves to ensure that they are sealed. In my judgment cl 5.1.1 is quite simply a safety catch provision to make doubly sure that the surveyor had carried out the duties in cl 4.1.1 to seal all the pipeline loading and discharging valves and other related inlet and outlet valves including the manhole cover. To that end, the surveyor is required to inspect all of these before loading to ensure the seals of the surveyor have not been tampered with. The words 'have not been tampered with' denote that by this stage, namely, before the loading, it is assumed that the seals of the surveyor are already in place. Following from this, it is explicit that there is a duty on the surveyor to inspect and seal all the valves, except the top outlets or loading lines before loading commences.

[21] In my judgment this is clear-cut answer in the affirmative to the issue stated in (a)(ii) that before loading, the attending surveyor must seal the pipeline loading and discharging valves and other related inlet and outlet valves except for the valves for the loading line. As to whether there is an obligation to check and confirm that all the valves on tank 56 were in open or close position and whether the defendant is to ensure that the valves were closed before loading, this to my mind is implied. This is because the surveyor, before he could even begin to think of sealing the valves, would have to first check and confirm the open and close positions of the valves and get them closed if need be. In fact, the word used in cl 5.1.1 is 'inspect' and this connotes active and unilateral act of the attending surveyor to check the position of the valves that they are sealed. This, in my view, would sufficiently answer the issue raised in (a)(i) above.

[22] I feel fortified in the view that I take from the following evidence adduced at the trial. For a start, I will take the evidence of Mr Thiyagarajah (DW1). He is a certified surveyor with MPOB and a branch manager of the defendant. It was he that had assigned Mr Steven Ong (DW7) to attend at the terminal of the third party on 15 December 2006 to carry out the survey of the plaintiff's cargo. His stance in examination-in-chief was that because the terminal had many tanks, pipelines and a few hundred valves it was impossible for the surveyor to know which the inlet or outlet valves were. It was therefore for the terminal to point out to the surveyors the valves that are to be sealed and if pointed out the surveyors would then seal them. However, under cross-examination DW1 conceded that as a prudent surveyor the defendant should have noticed that the valves were not closed and thereafter sealed. As well, he agreed that the main focus of the survey was to ensure that the proper quantity gets loaded onto the vessel and following from that it was the surveyor's duty to ensure that the inlet valve is closed and sealed prior to discharge from tank to vessel. Further, he conceded that in this case, before the gauging was done, the inlet and outlet valves were not closed and sealed and this was the cause of the contamination. He agreed that this occurred despite cl 4.1.2 of the MPOB Rules, which he conceded is there as a guide to DW7. We therefore have here an admission from DW1 that the defendant was under an obligation to ensure that the valves are sealed before gauging as well as before the cargo was discharged from the tank to the vessel.

[23] The admission from DW1 in court is consistent with the stance that he took during the meeting of 16 December2006 attended by all the parties. At that meeting DW1 in no uncertain terms admitted that it was the duty of the surveyor to check that all the valves on tank 56 except for the valve for the loading line to the vessel were locked and sealed with the surveyor's seals. Moreover, during the meeting, at the request of Mr Cheng ('PW1') representing the plaintiff, DW1 had spoken to DW7 on the phone and the latter was put on the speaker phone for all present at the meeting to hear. DW7 confirmed on the phone that he did not seal any valve on tank 56 and did not check whether the valves were in open or close position. These matters were recorded in the minutes of meeting produced at pp 79–81 of bundle C. DW1 in his evidence in court confirmed that the minutes were accurate. In addition, after the meeting, the minutes were circulated by email to those present at the meeting for confirmation. By his email at p 85 of bundle C, DW1 confirmed the minutes to be true.

[24] However, DW1, asserted in court that the meeting was held on a without prejudice basis and as such the minutes were inadmissible. I did not believe nor accept this part of the evidence of DW1. In the first place, it is not recorded either in the minutes or DW1's subsequent confirmation of the minutes that the meeting was held on a without prejudice basis. Secondly,

DW1's insistence on this is not consistent with the position taken by DW2, the general manager of the defendant, who, in his witness statement (D2) had referred to and relied on the minutes of the meeting unreservedly to support the defendant's claim in negligence against the third party. Furthermore, DW6, the expert witness of the defendant had also relied on what was recorded in the minutes to assert that the third party was negligent. The contradictory positions taken by DW2 and DW6 on this was to DW1's discredit. I was convinced DW1's evidence in court on this was an afterthought. Consequently, I found that the meeting was and could not have been held on a without prejudice basis.

[25] The defendant through learned counsel argued further that the discussions at the meeting and the conclusions and remarks made by the parties could not be relied on because these were made without a true knowledge of the circumstances. The defendant said that the third party did not disclosed at the meeting that the terminal had a practice of leaving the inlet valves open. According to the defendant, if the third party had disclosed this at the meeting, blame would have shifted to the terminal and DW1 would not have made the admission that it was the duty of the surveyor to check that all the valves on tank 56 were locked and sealed. With respect, this in my considered opinion is flawed reasoning. In the first place, the argument presumes that the terminal maintained such a practice. However, and I will say more on this later, the defendant failed to prove on balance that there was such a practice. Since it was not established in the evidence that the terminal maintained such a practice, to attempt to predicate what would have been said at the meeting, in my judgment, would be an exercise in futility. Besides, even if the terminal had such a practice and had gone on to disclose it at the meeting, it would still be a matter of pure conjecture whether DW1 would not have made the admission. The court should steer clear of delving into or deciding on conjectures so as not to fall into serious error.

[26] For the reasons given, the minutes of the meeting remained as a material, relevant and weighty piece of contemporaneous evidence before the court of the events that occurred and admissions made. It is to be preferred over the assertions to the contrary of DW1, DW2 or DW6.

[27] We next have the evidence of PW3. As an enforcement officer with MPOB her responsibilities are to monitor all activities related to the export of palm oil products including monitoring all related documents and the quality of export product. She is therefore very familiar with the MPOB standard surveying procedures. Moreover, the terminal of the third party was known to her five years. I was therefore quite satisfied she was a person qualified to speak of the duties and responsibilities of a surveyor under licence of the MPOB as

well as a person who had knowledge of the terminal in question. Through her evidence, the following material facts were established.

[28] When a surveyor licensed under MPOB is appointed by the principal, the former goes to the terminal to carry out the survey of the product to be exported. At the terminal, the surveyor confirms with the former as to the location of the tank containing the cargo of the principal. The surveyor then must ensure that, save for the manhole at the top of the tank, all the inlet and outlet valves are closed and sealed. The sealing is done by the surveyor. The surveyor then carries out gauging and sampling and when done, he must close and seal the manhole. Before the loading from the tank to the vessel, it is the responsibility of the surveyor to check and confirm that all valves of the shore tank are in open and close position. Upon checking, if the surveyor sees that a particular valve is open the surveyor should instruct the terminal to close it before he seals the valve. The surveyor cannot close the valve by himself because the task to close it is the responsibility of the terminal. For the related inlet and outlet valves, which are connected directly to the tank, it is the surveyor that has the right to instruct the terminal to close them. If the surveyor has given such instructions and the terminal refuses to do so, the surveyor has the right to raise a letter of protest to the terminal whereby the terminal would be responsible if the cargo is compromised. PW3 said these responsibilities of the surveyor and the terminal respectively are contained in cl 4.1.2 of the MPOB Rules.

[29] Under cross-examination, PW3 said she was unaware that the MPOB had inquired into and investigated the incident. She agreed that the surveyor could not do anything in a terminal without being accompanied by a terminal representative. As well, she agreed that it was the terminal's decision whether a valve is to be opened or closed. She disagreed that if the terminal decides that a valve is to be left open, the terminal has no reason to refer that particular valve to the surveyor for sealing. She also disagreed that should the terminal decide to leave all the inlet valves open at all times, it need not show those open inlet valves to the surveyor.

[30] Learned counsel for the defendant submitted that the evidence of PW3 was contradictory and appears to betray book knowledge of the MPOB Rules and not how the Rules operate in real life. Counsel said this is evidenced by the fact that although PW3 was in MPOB's enforcement and licensing division, she was completely unaware that MPOB had enquired of and investigated the incident. Furthermore, PW3 had admitted it would be a terminal's decision whether a valve should be opened or closed and a surveyor could not do anything in the terminal without being accompanied by a terminal representative. Notwithstanding these admissions, she had maintained the view, which the defendant said is contrariwise, that the surveyor should inspect and caused to be closed, no matter what the terminal thought, the inlet valves.

[31] I disagreed with the contention of the defendant that PW3's evidence was contradictory. The terminal very well might have decided which valves they want to keep open or closed, but when the surveyor comes along to conduct the survey, by virtue of his obligations under cll 4.1.2 and 5.1.1 of the MPOB Rules, he knows which valves he is supposed to seal before and after gauging and sampling and also before loading commences. And if whilst carrying out his duties as such, he discovers that the terminal has, in the exercise of this so-called discretion, left open, say, the inlet valves which, would prevent him from sealing them, then of course he is duty bound to get the terminal to close them. The fact that the terminal has decided of its own to leave those inlet valves open surely does not excuse the surveyor from checking the valves in the first place in order for him to be able to execute his primary duties under cll 4.1.2 and 5.1.1 to seal them. As a result, there was absolutely no justification in labeling the evidence of PW3 on this as being contradictory.

[32] As for the broadside on the credibility of PW3's evidence merely because she did not know of the inquiry and investigation I really did not see the reasoning behind it. If the argument is that her evidence was in question because it is in contradiction with the stance of MPOB as manifested by the conclusions of the inquiry, it behoves the defendant, by virtue of s 103 of the Evidence Act 1950, to prove the findings and conclusions of the inquiry. The defendant, however, failed in this. It was through DW2's evidence that the defendant claimed that a meeting was held between the MPOB and the defendant represented by DW2 and Mr Annuar, to investigate the cause of the contamination of the cargo. One Mr Shukri and a Mr Yakob were said to have represented the MPOB. It is noteworthy that neither the plaintiff nor the third party were called to or participated in this meeting. According to DW2, subsequent to the meeting, Mr Shukri had contacted him and verbally told him that MPOB had completed their investigations and did not find the defendant liable for the incident. MPOB instead found the third party to be fully responsible for the incident.

[33] Under cross-examination, DW2 confirmed that MPOB had never put in writing this exoneration of the defendant from blame. Now, this Mr Shukri was not called to testify and whatever DW2 testified as having been told him by the former remained as hearsay and thus inadmissible. What is more, the defendant did not call Mr Shukri or anyone from MPOB to confirm that MPOB had absolved the defendant from all blame. Consequently, nothing turns on this inquiry and investigation conducted by MPOB as the findings and conclusions are not proved, let alone that the defendant was cleared of blame. Given that the conclusions and findings of MPOB are not proved, it rendered meaningless the contention of the defendant that PW2's evidence was contradictory to MPOB's stance.

[34] The evidence of PW3 therefore remained weighty and reliable. It fortified the case for the plaintiff that the defendant was obliged under the MPOB Rules to check and confirm whether all the valves on tank 56 were in open or close position and then to ensure that they are closed and sealed before loading.

[35] To counter the case for the plaintiff on the role of the attending surveyor, the defendant through their expert witness Mr Abdul Rahim bin Zan ('DW6') referred to the MPOB Rules as well. DW6 referred in particular to cl 4 which provides that the procedures to be observed by the attending surveyor can only be carried out in the presence of the terminal's representative. Further, it was DW6's opinion that by cl 4.1.1 (see above), the surveyor is not at liberty to roam around the terminal as he likes and cannot take steps with regard the survey without first consulting the terminal's representative. According to him, this point is reinforced in the note to cl 4.1.2 which provides:

> Note: Closing all the unrelated interconnected pipeline valves, air vent valves and drip line valves is the responsibility of the installation's representative. Surveyors shall only inspect and seal all the unrelated interconnected pipelines valves upon consultation and on the advice of the installation's representative that the said valves are to be closed.

In his conclusion on the effect of cl 4, DW6 said that it 'limits the role of the attending surveyor to simply seal all the unrelated pipelines and valves and even then, only upon consultation and on the advice of the terminal's representative'. He added that there is little that the attending surveyor could do without the active participation and consultation of the terminal's representative. He could only inspect those valves pointed out to him by the terminal's personnel and then seal them if the latter closed the same. If the terminal's representative chooses not to close a particular valve or decides that a particular valve is not to be closed, the surveyor would have to accede to these instructions. He is not in the position to object and neither does the MPOB Rules require him to do so.

[37] The issues at hand do not require special skills. The issues are (i) whether under the MPOB Rules there is a duty on the defendant to seal the inlet valve; (ii) whether the failure of the defendant to seal the inlet valve is a breach of contract or negligence. It is a question of mixed law and fact well within the purview of the court, which do not require expert evidence. Furthermore, DW6 had not shown that he has the academic qualification or the necessary experience to be an expert on the interpretation of the MPOB Rules. The crux of the issue here is the responsibility of a surveyor licensed by MPOB to supervise the export of palm oil products and that requires a study of the MPOB rules. A perusal of the CV (exh ARZ1 of D8) of the DW6 would

show that he did not possess the qualification to be a palm oil surveyor in Malaysia. He has never sat for the MPOB examination, which all surveyors must pass in order to be registered as a palm oil surveyor. Instead, his professional qualification shows that he is only qualified to sail as an engineer on a seagoing vessel. The MPOB Rules are something that exist only in Malaysia and DW6 has not produced any previous work in relation to those rules. It is true that the expert's skill may be shown by his experience instead of his qualification alone. DW6 however has not shown any experience in the field of palm oil surveying in Malaysia. He was never registered with MPOB as a surveyor and was never employed as a palm oil surveyor in Malaysia. As well he did not produce any evidence of previous experience which investigates into the role of the oil palm surveyor and specifically in relation to the MPOB Rules. This is a must as these are the issues at the heart of the dispute between the parties. Although there is a list of listed cases as his notable achievements wherein he appeared as an expert witness, there are no particulars of the cases, the facts and issues. It has not been shown that those cases involved similar issues as in this case. I therefore found that it has not been proved that DW6 is a skilled person under s 45 of the Evidence Act to give an opinion on the role of a palm oil surveyor vis-à-vis the MPOB Rules. I was therefore constrained to ignore the opinion of DW6 on the construction of the MPOB Rules let alone the role of a palm surveyor under those rules.

[38] Whatever is so, I was of the view that DW6's reading of the MPOB Rules are in any case, completely wrong. Let us take for instance his interpretation of cl 4.1.1 alluded to earlier. The clause simply says, 'the following tasks shall be performed in the presence of the installation's representative'. Yet we have DW6 interpreting this as saying that the surveyor is not at liberty to roam around the terminal as he likes which is something extraneous and not there. This is completely wrong. Worst, we have him saying further that by these words (of cl 4.1.1) the surveyor is not to take any steps or precautions with regard the survey without first consulting the terminal's representative. Again, he has added something extraneous and one that is downright misleading. The clause speaks of the surveyor performing his tasks in the presence of the terminal's representative and not of the surveyor having to consult that representative before he takes any step in the performance of his duties. The surveyor has a duty to perform and it is to survey. By cl 1 of the MPOB Rules the term survey means inspecting, measuring, conducting sampling or superintending any activity relating to any movement or handling of palm oil and its derivatives. The surveyor, with respect, is not at the terminal to be himself superintended by the terminal representative as DW6 would have it.

[39] We have next, DW6's interpretation of the note to cl 4.1.2. His take on it that it limits the role of the attending surveyor to just sealing only *unrelated*

pipeline and valves and even then upon consultation and advice of the terminal's representative is, to my mind, way wide off the mark. I will elaborate. The first paragraph of cl 4.1.2, which is the main text, speaks of the role of the surveyor in relation to the pipeline loading and discharging valves and *other related* inlet and outlet valves as well as the manhole cover. The surveyor is to seal those *related valves* before volume gauging and sampling and then the manhole afterwards. Therefore, in substance, the first paragraph of cl 4.1.2 outlines the role of the surveyor in relation to the related valves. We know from the evidence of PW3 that related valves are those that are connected directly to the shore tank.

[40] We will now consider the note to cl 4.1.2. A careful reading of it will show that it deals with *unrelated* interconnected valves. We know too from the evidence of PW3 that unrelated valves mean those that are not connected directly to the shore tank. In my judgment, the note is actually something of a caution to the surveyor that as far as unrelated valves are concerned they are strictly the responsibility of the terminal representative. The surveyor shall only inspect and seal the unrelated valves upon consultation and advice of the terminal representative that they are to be closed. For that reason, DW6's summing up from a reading of cl 4 that the surveyor cannot close any valve he likes; that he can only inspect those valves pointed out to him by the terminal representative and then can only seal that valve if the terminal representative closes the same is wrong as the Note speaks only of unrelated valves. This summing up, I might add, is probably appropriate if we are talking of unrelated valves but to say that it applies to all valves including the related inlet and outlet valves is patently wrong. Furthermore, we are here not concerned with unrelated valves but with the related inlet and outlet valves. As previously mentioned, it was the related inlet valve of tank 56 that is relevant to the issue of contamination.

[41] For the reasons given above my answer to the issue stated in (a) above is as follows. In relation to (a)(i) above, the MPOB Rules impose a duty on the defendant whist carrying out the survey to check and confirm that all related valves on tank 56 were in open or close position. In relation to (a)(ii) the same Rules impose an obligation on the defendant to ensure before loading that all related valves except for the valves meant for the loading line, were closed and sealed. As explained earlier the non-compliance on the part of the defendant with the duties imposed by the MPOB Rules would constitute a breach of duty of care of the defendant in contract and in tort.

Did the defendant check the open/close positions of the valves and/or close and seal them?

[42] The evidence on this is incontrovertible in my opinion. DW7 described

how by the time he arrived at the terminal on the morning of December 15, 2006 to conduct the survey; Mr Saravanan was already with the terminal's Stock Clerk on top of shore tank 56 taking soundings. Once the soundings were completed DW7 proceeded to take samples from tank 56. After the samples were taken, all three of them climbed down tank 56 whereupon DW7 instructed Mr Saravanan to go with the stock clerk to the office to make the calculations to confirm the quantity of the cargo. DW7 thereafter went to the office of the terminal supervisor to confirm the loading instructions especially with regard to the heating for the cargo. Upon being informed by the terminal supervisor that there were no heating instructions and that the MT Trans Rayong was already alongside the terminal ready for cargo loading, he proceeded to the vessel. There he met the terminal's loading master and the vessel's chief officer. He inspected all the cargo tanks onboard the vessel as well as the vessel's manifold and found all fit for loading. Thereafter, he went to the wharf to inspect the terminal's loading manifold and found it clean and fit for loading. He then informed the loading master that the vessel was ready to receive the cargo. Whereupon the terminal staff then connected the flexible hose from the terminal's loading flange to the vessel's loading manifold and loading commenced.

[43] DW7 added that neither the terminal supervisor nor the stock clerk or loading master at any time had asked him to seal any valves of the terminal pipelines and neither did they discuss with him the closing or opening of any valves of the shore tank. He took the position that all such matters were dealt with by the terminal's personnel. Initially under cross-examination, he agreed that by cl 4.1.1 of the MPOB Rules the related inlet and outlet valves shall be sealed before gauging and sampling and after the gauging and sampling cl 5.1 requires him to seal the inlet valve. He admitted that although he carried the seals with him during the survey, he did not seal the inlet valve. However, in the later part of his cross-examination he changed his evidence and denied that it was his duty to seal the inlet valve. He went on to deny it was his duty to instruct the terminal to close the inlet valve. He appeared to take the position that as it was the duty of the terminal to close and seal the inlet valve, he did not have to seal it.

[44] Whatever DW7 might have said concerning who was responsible for either closing or sealing the inlet valves, the fact remained that he did not seal any valve during the survey. Neither did he ask the terminal to close any valve. Further, although he did not directly said it, it is clear from his chronology of events that from the time of arrival at the terminal until the time of commencement of loading of the cargo, he did not at any time even check the open or close position of any valve. Neither did he ask any of the terminal representatives concerning them. What is more, his assertion that the terminal's personnel dealt with all such matters and that it was not his duty but

that of the terminal to close and seal the inlet valves served to drive home the point that he could not have done any of these things.

[45] That DW7 had not sealed the valves was in fact confirmed by DW1 in his evidence. DW1 agreed that the inlet and outlet valves were neither closed nor sealed before gauging and this was so despite the presence of DW7 at the terminal. He said too that the contamination occurred because those valves were never sealed. In addition, we have his evidence as earlier referred to that during the meeting of 16 December 2006 DW7 had confirmed on the phone that he did not seal any valve on tank 56 and did not check whether the valves were in open or close position. As explained earlier, the minutes of the meeting recording the admission of DW7 are admissible. I considered the minutes as constituting relevant and contemporaneous evidence of the admission of DW7.

[46] Clearly then, it has been established that DW7, and therefore the defendant, failed to check and confirm whether any of the valves on tank 56 were in open or close position and failed to ensure that before loading, all the valves, except for the valves meant for the loading line, were closed and seal. This necessarily meant that DW7 did not do likewise with the inlet valve of tank 56.

Whether the defendant's failure to check and confirm the close/open positions of valves and the failure to close and seal all the valves except the valves meant for the loading line has contributed to the contamination

[47] It was contended for the defendant, and this is central to their case, that even if there was a duty on them to seal the inlet valve, they nevertheless would not have been allowed by the third party to do so. This is because the terminal had a strict policy of keeping the inlet valve open at all times and even if the attending surveyor had insisted for the inlet valve of shore tank 56 to be closed at the material time, this request would have been rejected outright based on the third party's instructions. The defendant submitted that in the face of such strict practice of the third party liability for the incident must completely lie at the third party's door.

[48] The line of defence of the defendant being such, it called for a determination of two matters namely:

(a) whether there was such a policy or practice in existence; and

(b) whether the defendant would have been prevented from sealing the inlet valve in the face of such a policy.

Was there such a policy of the third party that all inlet valves are to be left open at all times?

[49] It is axiomatic that the burden of proving the existence of the policy of the third party lies on the defendant being the party that wished the court to believe in its existence (see s 103 of the Evidence Act 1950).

[50] The first piece of evidence that the defendant relied on is an alleged express admission made by TPW2, the employee of the third party that such a practice existed at the material time. DW6 testified that on 29 April 2009 he attended at the terminal of the third party to carry out an inspection of the premises. Upon arrival, the general manager of the terminal, Mr Hj Mohd Noor ('TPW1') and the assistant general manager, Mr Kamarulzaman ('TPW2'), met him. At the meeting, Mr Kamarulzaman told him that the terminal had set a very strict rule that the inlet valve of shore tank 56 must not be closed under any circumstances. DW6 did not explain why it was that since both TPW1 and TPW2 met him upon arrival that he spoke of only TPW2 having given him this crucial piece of information. Anyway, TPW2 told him that this practice was enforced because in the past remnants of Lorol cargo have solidified in the vertical section of the inlet pipeline causing difficulty to the terminal personnel the next time the same tank was used. Lorol cargo solidifies at ambient temperature and needed heating during storage. However, heating facilities are only for the cargo inside the tank and as a result, the remnant in the vertical section of the inlet pipe, which is outside the tank, would not be heated. TPW2 said that as long as the inlet valve was left open, the Lorol cargo remnant would simply form a layer in the entire loading pipeline and would not cause a blockage.

[51] In his evidence, DW6 spoke of permission for him only to inspect the terminal. Moreover, he did not mention anyone else going with him. However, after DW6 had testified, the defendant produced one Mohamad Rashid (DW8) to corroborate the evidence of DW6. DW8 claimed in examination-in-chief that he too went to the terminal with DW6 as an assistant — that makes two of them. DW8 said that they were met upon arrival by TPW1 and TPW2 but afterwards, it was only TPW2 that had brought them to the loading bay and on to inspect tank 56 and 71. TPW1 had not followed them. DW8 claimed that it was during the inspection of tank 56 that TPW2 had told them that the inlet valve of tank 56 was always kept open. The reason for this is the remnants of the product that had been loaded into the tank would flow down the vertical section of the inlet pipe into the horizontal section. If the inlet valve was closed, the remnants would stop at the valve and that would clog the vertical line. The only way the next cargo could go through was for the terminal to use steam to clear the solidified remnants of the cargo in the pipeline. Under cross-examination, DW8 disclosed for the first time that there

was yet another person who went along with them for the visit at the terminal that day. He was Mr Mohamed Goush, the partner in the Singapore law firm of Messrs TS Oon & Bazul wherein learned counsel for the defendant is a partner. There are now three of them. DW6 mentioned none of this in his evidence.

[52] TPW2 in his evidence denied outright that he had made such an admission to DW6 and DW8. Both TPW1 and TPW2 said that out of the three persons that had visited the terminal, it was Mr Mohd Goush that had played the more active role and spoke the most. Their evidence on this was not challenged. It is trite that unchallenged evidence is deemed admitted (see *Public Prosecutor v Abang Abdul Rahman* [1982] 1 MLJ 346). Mr Mohd Goush was not produced to testify at the trial. His evidence was material because there was a conflicting version as to whether TPW2 made that admission. The question that arose was why the defendant did not call Mr Mohd Goush to testify to corroborate DW6. One would have thought that in the ordinary course he would have been a far better witness than DW8 to corroborate the conversation during the visit. This is because during the visit, DW8 neither spoke nor asked questions. He appeared to have been merely listening to the conversation but he admitted his English was not that good and the group was speaking in mixed languages. He too said that Mr Mohd Goush asked some questions. Moreover, being a partner of the legal firm of TS Oon & Bazul and with knowledge of the facts, Mr Mohd Goush would surely have realised the importance of the information given by TPW2 and would surely have made record of some sort of the conversation eg sending a letter confirming the details of the conversation. He was therefore a material witness who ought to have been called but was not called by the defendant. In fact, it would appear that the defendant did not disclose his presence and participation during the terminal visit until it was brought out in the cross-examination of DW8. The solicitors for the defendant had also not disclosed this to the solicitors for the third party. This in my opinion, amounted to a suppression of this material witness. In *Alan Thomas Bohlsen v Draftworldwide Sdn Bhd* [2009] 8 MLJ 461 Abdul Malik Ishak J said at p 485:

> [51] Thirdly, according to Anthony Jerard, it was Greg Paul who was based in Singapore who had the requisite authority to make the recommendation. … But the defendant did not call Greg Paul as a witness and I would not hesitate to make an inference adverse to the defendant pursuant to s 114(g) of the Evidence Act 1950 … [52] The Singapore based Greg Paul could have been produced and called to testify by the defendant. But, alas this was not done. It was a pure case of withholding evidence by not calling Greg Paul. In *Public Prosecutor v Guan Sheng Trading Sdn Bhd* [1997] 4 MLJ 20, I emphasised that an adverse inference can only be drawn if there was withholding of evidence and not merely on account of the failure to obtain evidence.

Similarly, in our case, the Singapore based Mr Mohd Goush should have been called. In not calling him the defendant had withheld evidence and as such, adverse inference under s 114 (g) of the Evidence Act ought to be raised against the defendant. The inference here being that if he was called, he would deny the particulars of the conversation as alleged by DW6 and his evidence would favour the third party.

[53] For the reasons given, the defendant had not, in my judgment, proved that TPW2 made any admission of the sort alleged by DW6 and DW8.

[54] The defendant next sought to prove the existence of the practice through the evidence of DW3, DW4, and DW5. DW3 is an employee of the defendant. At one time, he was employed by the third party's sister company, Fima Liquid Sdn Bhd, for eight years from 1996 – 1998. He had never been in the employment of the third party. Even so, he went on to say that he agreed with the evidence of the next witness for the defendant, namely, DW4, who was to testify after him, that the third party maintained this practice of leaving the inlet valves of shore tank 56 open at all times. DW4 is also an employee of the defendant. When he was 18 years old he was employed by Fima Liquid Sdn Bhd, the so-called sister company of the third party. He left in 2002. He was never employed by the third party but nevertheless testified on the practices at the third party's terminal, in particular the practice of leaving open the inlet valves of shore tank 56 at all times. However, under cross-examination DW4 admitted that he had discussed the case and his proposed court evidence with DW3, DW5 and DW6.

[55] DW5 on the other hand is the unhappy ex-employee of the third party. He claimed to have left the employment of the third party on 22 February 2000 and that he was testifying on behalf of the defendant out of the goodwill of his heart. However, it was shown during cross-examination that he did not leave the employment of the third party but was sacked for misconduct. He filed a claim for wrongful dismissal against the third party at the industrial court but the claim was dismissed. There being bad blood between DW5 and the third party, I considered his evidence on the practices of the terminal of the third party as very much suspect and to be treated with caution. Besides, he was speaking of practices that he claimed were in existence before his dismissal in February 2000, and that was more than six years before the incident of 15 December 2006. February 2000 to my mind is much too way back in time for the evidence of DW5 to be of any relevance.

[56] It was established through the cross-examination of both DW3 and DW4 that Fima Bulking Services and Fima Liquid were operating from two separate and distinct terminals instead of one. In addition, under cross-examination, they revealed that there could not be any free movement of

personnel between the two companies as each is enclosed by a fence and if a personnel from either company desired to go to the other, he has to go through the port authority which requires a permit. With that in mind and coupled with the fact that DW3 and DW4 had never been in the employment of the third party, there was no evidence to show that either DW3 or DW4 had personal knowledge of the practices of Fima Bulking Services, the third party. That being the case, there was no basis whatsoever of their evidence of knowledge of the practices that were implemented at the terminal of the third party. Consequently, I found their evidence on this carried no weight.

[57] In light of the admission of DW4 that he had discussed the case and his proposed court evidence with DW3, DW5 and apparently DW6 as well, there was a real possibility of the witnesses giving uniform evidence. In fact, this is true of the evidence of DW3, DW4 and DW5 who gave markedly uniform account of the practices at the terminal of the third party. This was yet another reason for me not to attach too much weight to their evidence. In such circumstances, nothing turned on the evidence of DW3, DW4 and DW5 towards proving the existence of the practice of the third party in leaving the inlet valves open at all times.

[58] The defendant next referred to one aspect of the evidence of TPW1 and TPW2, which learned counsel said was so inherently improbable that it only served to strengthen the case for the defendant that the practice at the terminal at the material time was to leave open the inlet valves at all times. What was this evidence? According to counsel for the defendant it is this. TPW1 had expressly admitted during the course of his testimony that there was a practice at the terminal at the material time for the inlet valves of certain shore tanks to be left open. He said that it was only those tanks which carry cargo with a high risk of solidifying at ambient temperature that are subject to such practice. He identified myristic acid as being one of those cargoes. Shore tank 56, he said, contained Lorol and as such is not one of those tanks. TPW2 supported the evidence of TPW1 when he said in his witness statement that only those inlet valves of tanks that handled cargoes that solidified at room temperature are left open during the day to day receiving operation. He as well said that at the material time the product received into tank 56 was Lorol, which does not solidify at ambient temperature.

[59] Learned counsel for the defendant contended that with the evidence of these two witnesses being such, it was not the case for the third party that the inlet valves of all tanks are always to be closed but that the inlet valves of some of the tanks are left open and some left closed. He submitted that in this way the third party sought to avoid the admission made by TPW2 to DW6 and DW8. He said that TPW1 and TPW2 had been less than honest in their evidence when they claimed such a practice of leaving some inlet valves open

and some closed, existed. Their evidence, according to counsel, is unbelievable and a myth. He gave the following reasons for contending so.

[60] First, TPW1's and TPW2's assertion was completely inconsistent with the terminal's own standard operating procedure ('SOP') whereby para 2.18(10) (at p 62 of bundle f) expressly states that the terminal's personnel are to close all tank valves at the end of the day. The defendant says that the SOP speaks of all tank valves and does not distinguish between tanks where cargo may solidify and those where cargo would not solidify. As such, going by the SOP, inlet valves of all (and not some only) shore tanks are to be left closed at the end of the day. The defendant contended that if the procedure was for the inlet valves of some tanks to be left open and some closed, surely it would have been provided for in the SOP and it is not there. From the foregoing, the case for the defendant seemed to be that consistency with or inclusion of an alleged practice in the SOP is crucial. If it is inconsistent with the SOP or is not in the SOP, it was a sure indication of the untruthfulness of the assertion of TPW1 and TPW2 that such a practice of leaving some inlet valves open and some closed existed.

[61] I find it rather curious that the defendant should have relied on the SOP, in particular, para 2.18(10) to drive their point home. Paragraph 10 reads thus:

> At the end of the day operations, the Leadman to clear the tank receiving lines, hoses, pumps and drip trays. Prior to line clearing to ensure the compressed air line/nitrogen line and all hoses used for clearing are clean and dry. To closed all tank valve[s] before leave the bay.

As counsel for the defendant had himself pointed out, this standing instruction in para 2.18(10) of the third party's SOP is for all tank valves including the inlet valves to be closed at the end of the day. In fact, this instruction to close all tank valves before leaving the bay (at the end of the day) ties in with the case for the third party and the evidence of TPW1 and TPW2 that there never was any instruction or a practice for the valves of the shore tanks to be left open at all times. To turn the argument of the defendant on its head, the incorporation of the standing instruction to close all tank valves at the end of the day shows consistency in the case for the third party that there was no strict policy of keeping the inlet valves open at all times.

[62] Secondly, the defendant argued that it would not be possible for the terminal to implement such a plan on a daily basis considering there are 72 bulking shore tanks at the terminal and only four personnel on duty at any one given time. These four personnel would have to keep themselves updated on a daily basis as to which tank would fall into which category. To illustrate the enormity of the task, counsel for the defendant pointed out that on 15 December 2006 for instance, there were no less than 78 movements of cargo

from various tanker trucks to various shore tanks occurring at the terminal during the period of eight hours. This works out to four terminal personnel having to deal with about ten separate movements of cargo per hour and only about six minutes to deal with each tanker truck. Added to that, the documentary evidence (p 3 of bundle g (tp7)) indicate that each tanker truck would take at least one hour to complete its discharge operations and this simply mean that it is not possible for all four personnel to be working at one loading bay at any point in time. The pressure of work would cause them to be spread thinly all over the terminal. Against this background, one would have to imagine how the terminal personnel would have time to go about checking which shore tank carries cargo that easily solidifies as opposed to those that do not. Unless there is some sort of daily record, the evidence of which the third party had not adduced, that is circulated to all terminal personnel, it would simply not be possible for the terminal personnel to memorise what inlet valves are to be left open.

[63] With utmost respect, the answer to these contentions of the defendant is right there in learned counsel's submission when he suggested that, 'one has to imagine'. This, and again I say it with no disrespect intended, is precisely what went on here — the scenario is imagined and based on conjecture and assumptions instead of from facts established by evidence. For instance, the defendant assumes as follows:

(a) that the four personnel would need to update themselves daily as to which tanks contained cargo that solidifies easily and which ones do not;

(b) it is not possible for all four personnel to be working at one loading bay at any point in time; and

(c) the terminal does not have some sort of a daily record as to which tank contains what.

[64] What is the basis for making these assumptions? To make these assumptions counsel would have to fall on facts established by evidence and other variables which are not adduced in the evidence for the simple reason they are neither relevant or are not issues for trial in the first place. For instance, when it is assumed that the four personnel would need to update themselves daily as to the type of cargo being loaded into the shore tanks, this is assuming that the terminal keeps on changing the type of cargo that is to go into a particular shore tank. However, there is no basis or justification for presuming this. In fact, quite the opposite was proved by the evidence. TPW1 and TPW2 had consistently maintained that tank 56 was especially for handling Lorol cargo at the material whereas tank 71 was for myristic acid. This evidence was not challenged. DW6 as well had alluded to this in his witness statement and appeared to have accepted the specific use of shore tanks 56 and 71 in that manner. In addition, the use of these two shore tanks in that manner was

recorded in the minutes of the meeting of 16 December 2006. To my mind, the certainty in the evidence as to the use of tank 56 for Lorol cargo and tank 71 for myristic acid suggests an orderly system in place on the type of cargo that goes into these shore tanks. This is very different from the picture of near chaos on a daily basis at the terminal as painted by the defendant because workers have to go about checking which shore tank, 72 of them to boot, carries cargo that easily solidifies and which ones do not.

[65] As for saying that it is not possible for all four personnel to be working at one loading bay at any point in time, who is to say this cannot take place when we do not have the full facts as to the work procedure, protocol or system adopted by the terminal for their daily operations. We can never have the full facts on this because the trial is not about this and none of the parties was expected to produce such evidence. With regard the remark from the defendant that the third party did not produce evidence of there being some sort of a daily record to be circulated to all personnel, the very existence of such a record is premised on assumptions in the first place and is a fiction. No one is expected to be able to produce tangible evidence of something that is hypothetical.

[66] Fourthly, the defendant alluded to the evidence of TPW1 that there were changes introduced at the terminal and to the operations procedures after the incident. The first is that the SOP was changed on 5 January 2007, about three weeks after the incident, to say specifically that the inlet valves must be closed during loading procedure from tank to ship (see A3 of p 63 bundle F). The defendant contended that this was added because the usual procedure was to leave the inlet valves open at all times as condoned at least by TPW2. The second change is the addition of a new valve at the loading bay, which enables the worker when at the loading bay to open the valve. The defendant contended there is no reason to have a second valve at the loading bay if, as the terminal now maintains, the inlet valve is always left closed. This is because the attendant would still have to check and open the inlet valve each time a parcel of cargo is pumped in. The new valve would only make sense if the inlet valve at the tank were always left open as the worker at the loading bay can control this valve and is saved the trouble of having to walk to the tank to check whether the inlet valve is open or closed. The defendant contended that the new system is in fact an innovation to preserve what the defendant maintained to be the terminal's usual practice before and after the incident ie to leave all the inlet valves at the tanks open.

[67] TPW1, under cross-examination, freely admitted these changes were introduced as a response to the incident. But, as he said, and I find this to be fairly reasonable explanation, previously, even with their worker always checking the inlet valve, mistakes were still made as in this incident because the surveyor also had not checked. He said that the purpose of the additional valve

is to put more difficulty in the way of mistakes waiting to happen. As for the operations procedure manual, he said that the third party had to update when they find better and safer ways to work.

[68] The final argument that the defendant had advanced in making its case that the third party maintained this strict policy of leaving the inlet valve of shore tank 56 open is to do with the characteristics of the Lorol cargo itself. It was the case for the defendant that Lorol C12-14MY solidifies at ambient temperature at the bulking terminal at Port Klang. Since Lorol cargo was stored in shore tank 56 it made sense for the third party to have in operation this strict policy of leaving the inlet valve of tank 56 open at all times. An open inlet valve would overcome the problem of clogged inlet pipe caused by solidified remnants of the Lorol. Furthermore, there was evidence to indicate that the cargo was actually heated before loading which is an indication of solidification.

[69] In order to succeed in the argument the defendant must prove as follows:

(a) that Lorol C12-14MY solidifies at the ambient temperature at the terminal at Port Klang; and

(b) that the cargo was heated.

For the third party we have the evidence of both TPW1 and TPW2 that Lorol cargo does not require any heating whatsoever. TPW1 testified that prior to the incident, the third party had handled Lorol cargo not less than five years. During all that time, Lorol cargo did not require heating and they did not heat it. TPW1 explained that this is because the temperature at Port Klang never falls below 25°C, which necessarily means that Lorol cargo, with its solidification range between 17–23°C, will never solidify there. Besides, without heating instructions the terminal would not carry out heating as it means additional handling costs for the cargo owner. Furthermore, if the cargo was heated, the quality of the cargo would deteriorate and that is especially true of oleo chemicals of which Lorol is one.

[70] There was corroboration of the evidence of TPW1 and ironically, it comes from the defendant's own witness, DW7. As we know, DW7 was the attending surveyor who went to the ground at the terminal. His evidence is that after carrying out gauging and sampling, he went to see the terminal supervisor to confirm the loading instructions with regard the heating for the cargo. The terminal supervisor confirmed that there was no special heating instructions required for this cargo and that the cargo was to be stored onboard at ambient temperature. Consequently, in the surveyor's instructions to the vessel (at p 188 of bundle C) DW7 gave no instructions for the heating of the cargo during the voyage and jotted down the temperature as ambient. In addition, he confirmed

that during the loading of the cargo onto the vessel there was no heating of the cargo. To my mind, the evidence of DW7 that there were no special instructions for the heating of the Lorol cargo and for the temperature to be maintained at ambient temperature was to the credit of TPW1. It was strong corroboration of the evidence of TPW1 that Lorol in his experience never needed heating. That being the case there was no reason for this particular cargo of Lorol of the plaintiff to have been heated.

[71] The case for the defendant rested primarily on the evidence of DW6. In examination-in-chief he said that the technical specifications of Lorol as provided in the material safety data sheet (MSDS), (at p 89 of bundle F), clearly states that the temperature solidification range of Lorol is between 18–23°C. He said this means that Lorol begins to solidify once its temperature reaches between 18–23°C. According to him, the ambient temperature at Fima Bulking Services terminal at Port Klang is probably about 30°C during daytime and would probably drop to 22–23°C at night. Bearing in mind the solidification range of the Lorol cargo and the ambient temperature at the terminal, he said that it is not possible for the Lorol product to solidify during the course of the day but that it probably would at night. This then was the sum total of the evidence from the defendant on solidification of the product — that it would probably solidify at night if the temperature drops to 22-23°C.

[72] With regard whether the Lorol cargo was heated, DW6 said that the temperature reading at the shore tank 56 taken by DW7 before loading process begun on December 15, 2006 was 37°C. The temperature reading is shown at p 93 of bundle C and DW7 later was to confirm the correctness of this temperature reading. DW6 was emphatic that the reading of 37°C could not be ambient temperature and that the Lorol cargo would surely have been heated to reach that temperature. It can be seen from the evidence of DW6 that his basis for saying that the Lorol cargo was heated was because the temperature reading at 37°C was not the ambient temperature. And what did DW6 say the ambient temperature at Port Klang was? He said probably 30°C during daytime and probably 22–23°C at night. In fact, under cross-examination he said the average ambient temperature is 26°C. The difference between his ambient temperature and 37°C is of course big and comes up to 11 degrees if the average temperature of 26°C is taken. If the daytime temperature of 30°C is taken the difference is 7 degrees. The difference is spectacular and I was convinced that was the reason for the apparent confidence of DW6 in his opinion that the cargo was surely heated.

[73] However, in my judgment, the conclusion of DW6 on this is flawed. I will explain. DW7 in his evidence stated that the ambient temperature reading that he took at the terminal on 15 December 2006 at 9am was 32°C. This was the actual reading of the ambient temperature at the terminal that day. The

difference between the actual ambient temperature reading at 32°C and 37°C is 5 degrees. The question is would DW6 still maintain that the cargo was heated if his mind was directed to the true and actual difference in the temperature? We will never know because he was never asked and he was supposed to be the expert. On my part, I dare not speculate. Given that it had been demonstrated that the conclusion by DW6 that the cargo had been heated was flawed, I did not think to attach much weight to his evidence on this.

[74] That was not the main reason for me not to attach too much weight on the evidence of DW6. There was further and weightier reason, which is crucial. It came about from the cross-examination of DW6. Whatever he said in examination-in-chief pertaining to solidification of the Lorol cargo at ambient temperature and heating was effectively brought to nought. I will explain. During cross-examination, the sampling/analysis certificate (at p 97 of bundle C) was referred to DW6. This document is the certificate issued by the defendant on the analysis of the sampling of the Lorol cargo of the plaintiff taken at the time of loading. Under 'Solid Range ° C', the reading is 17–23°C. DW6 said this means that the Lorol cargo would solidify if its temperature remains within this range. However, under the column, 'Tested Results' the reading is 20.7°C and DW6 agreed that it means that the tested results show that the Lorol cargo would only begin to solidify at 20.7°C. With regard the ambient temperature at Port Klang, he said that the average ambient temperature is 26°C and it normally does not fall below 22°C. The cross-examination of DW6 then proceeded in this manner:

> Q: In other words from the test that was done of this product it shows it will never solidify in Port Klang?
>
> A: Correct.

[75] So here we have it straight from the horse's mouth. Since Lorol C12-14MY would never solidify at Port Klang, why then would the terminal heat the cargo as he claimed? There was absolutely no reason to. As with the evidence of DW7, the evidence of DW6 in the end rendered credible the evidence of TPW1 and TPW2 that Lorol C12-14MY had never needed heating for the reason that it does not solidify at ambient temperature at Port Klang. That being the case, I found that the defendant had not proved on balance of probabilities either that Lorol C12-14MY solidified at ambient temperature at Port Klang or that the Lorol cargo was heated prior to loading on 15 December, 2006. Instead I found on balance of probabilities that the Lorol cargo was not heated at the terminal of the third party at Port Klang for the reason that it does not solidify at ambient temperature there.

[76] In conclusion, the defendant being the party that wished the court to believe that the third party had in force this strict policy of leaving open the inlet valve of shore tank 56, it bore the burden of proving it. For the reasons given above, I found that the defendant had failed in discharging that burden and therefore failed to prove the existence of such a policy. In light of that, the defendant's case for saying that even if there was a duty on them to seal the valve they nevertheless would have been prevented from doing so by the third party because of the existence of this strict policy collapsed. As said earlier, and this is not disputed, the cause of the contamination of the Lorol cargo was the accidental pumping of myristic acid into shore tank 56 because the inlet valve of shore tank 56 was not closed. In light that the defendant was under a duty to ensure that the inlet valve was closed and sealed, but failed to do so, the defendant had well and truly contributed to the contamination of the cargo and were negligent and had breached their contractual duties to take care.

Whether the defendant would have been prevented from sealing the inlet valve in the face of such a policy

[77] In light that I found that the third party did not have this practice of leaving open the inlet valve of shore tank 56, this next issue becomes irrelevant and it was not necessary to consider it. Nevertheless, for the sake of completeness and in the event I was wrong in concluding that the defendant had failed to prove the existence of such a policy of the third party I thought it prudent to consider the matter. It was my considered judgment that even if the defendant had proved that the third party had practiced such a policy, it was presumptuous still of the defendant to assume that any request of theirs for the inlet valve to be closed and sealed would have been rejected outright. My reasons for saying so are as follows.

[78] In the first place, as TPW1 puts it, DW7, the attending surveyor, had not even checked whether the inlet valve was closed or sealed. He said that had DW7 done that, he would have discovered that the inlet valve was still open and could have instructed or requested the terminal's representative to close it and thereafter DW7 should have proceeded to seal it. TPW1 made it plain and clear that the terminal representative would have complied with such instruction or request from the surveyor. I could not have agreed more with TPW1 on this. DW7 was under a duty to seal the inlet valve but there could be no sealing unless the valve was closed. It made no sense for the terminal representative to refuse to close the inlet valve if requested by the surveyor knowing very well that the surveyor was under duty to seal the inlet valve. Furthermore, the terminal representative could not refuse such a request for no rhyme or reason when that could lead to the possibility of other products coming in through the open inlet valve, which would certainly compromise the quality and quantity of the cargo. As it were, DW7 had not even checked or

inspected the inlet valve with a view to sealing it. That is why I say the defendant is rather presumptuous to postulate that the terminal representative would have rejected outright a request to close the inlet valve.

[79] As discussed earlier, the case for the defendant for saying that a request from DW7 would have been rejected outright flowed from a perception that under the MPOB Rules only the third party's personnel were allowed to open or close any valve of the terminal. The defendant further believed that the external surveyor could only seal a valve identified by the third party and is not expected or allowed to roam around looking for the inlet valve. We have seen too how the defendant had relied heavily on the evidence of DW6 and his interpretation of the MPOB Rules, in particular, cll 4.1.1 and 4.1.2 (and the notation) to support their contentions. I believe I have clearly demonstrated the errors in DW6's interpretation of cll 4.1.1 and 4.1.2. To recap, cl 4.1.1 merely requires that the surveyor was to perform the tasks during the initial inspection *in the presence* of the terminal's personnel. Yet we have DW6 reading into it that the surveyor cannot be expected to roam around looking for the inlet valve and is not to take any step or precaution with regard the survey without first consulting the terminal's representative. This is wrong. We also have DW6 misapplying the note to cl 4.1.2. The note clearly speaks of the role of the attending surveyor in relation to *unrelated interconnected* valves. These unrelated valves are strictly the responsibility of the terminal representative and the surveyor shall only inspect and seal them upon consultation and advice of the terminal representative that they are to be closed. Yet we have DW6 reading into it that the surveyor cannot close *any valve* he likes; that he can only inspect those valves pointed out to him by the terminal's representative and can only seal that valve if the latter closes it. This is completely wrong.

[80] Furthermore, and this was mentioned earlier, DW6 had totally misconstrued the role of the surveyor when carrying out the survey pursuant to the MPOB Rules. The surveyor had a job to do and it was to inspect, measure, conduct, superintendent the movement or handling of the Lorol cargo onto the MT Trans Rayong in accordance with the MPOB Rules. It very well might be the decision of the terminal to leave open or close any valve they want, but when the surveyor comes along to conduct the survey, by virtue of his obligations under cll 4.1.2 and 5.1.1 of the MPOB Rules, he should know which valves he was supposed to seal. And if whilst carrying out his duties he discovers that the terminal has left open the inlet valves which, would prevent him from sealing them, then he is duty bound to get the terminal to close them. The fact that the terminal has decided of its own to leave those inlet valves open surely does not excuse the surveyor from checking the valves in the first place in order for him to be able to execute his primary duties under cll 4.1.2 and 5.1.1 to seal them. Going by the evidence and assertions of DW6, the surveyor,

instead of attending at the terminal to superintendent the loading, he was there to be himself superintended by the terminal representative. This was completely wrong.

[81] As for the comment from DW6 that the surveyor was not expected to roam around the terminal looking for the inlet valve, that to my mind was pure exaggeration. DW7 had only to inspect shore tank 56. He need not roam around to look for the inlet valve because it cannot be far away from the tank itself. Actually, by looking at photographs 9, 10 and 12 of exh P25 the inlet valve of shore tank 56 is right next to the tank. No prudent surveyor would have missed it.

[82] For the reasons given above, I would say that even if at the material time the inlet valve had been left open following from the third party's usual practice, the defendant still had absolutely no basis or justification for saying that the terminal representative would not have acceded to a request from DW7 to close the inlet valve. As it were, the inlet valve remained open because DW7 failed to inspect it and did not seal it. In failing to seal it, the defendant was negligent and had breached its contractual duties. It was liable for the contamination that ensued.

APPORTIONMENT OF BLAME

[83] The third party had from the beginning accepted that it was partly to blame for the contamination of the plaintiff's cargo. That was to their credit. The facts giving rise to the culpability of the third party have been outlined earlier when discussing the cause of the contamination of the plaintiff's cargo. Briefly, it is this. An additional parcel of Lorol C12–14 was discharged into tank 56 on 14 December 2006. The terminal attendant did not take out the discharge pump from the reception line of tank 56 after the operation. He had also failed to close the inlet valve of tank 56. The next day a consignment of Myristic Acid destined for tank 71 was caused by the terminal to be wrongly pumped into tank 56. This was due to the terminal attendant using the same discharge pump, which was still connected to the reception line of tank 56 and the inlet valve of tank 56 having not been closed the previous day.

[84] The culpability of the defendant arose in this manner. In carrying out the survey of the loading of the Lorol cargo, the surveyor was under a duty to inspect the inlet valve of shore tank 56, ensure it is closed and then seal it. However, the attending surveyor, DW7, did not at any time during the survey inspect the inlet valve or ensure it was closed. Neither did he seal it. Had he carried out his duties he would have discovered the open position of the inlet valve and caused it to be closed and then sealed. The contamination could have then been averted.

[85] In terms of the degree of blameworthiness of the defendant and the third party I would say they were equally to blame. This is because both bore equally onerous duties towards the plaintiff. The third party was to load the cargo on to the vessel and the defendant was to survey that process. One could say that the third party started it all when it negligently used the wrong discharge pump and then not closing the inlet valve. The defendant on the other hand could have prevented the occurrence if they had inspected the inlet valve and sealed it. Under such circumstances, it is impossible to say that one party is the more blameworthy than the other is. In my judgment, they were equally to blame and so I held.

LIABILITY

[86] It is clear law that if each of several persons, not acting in concert commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the whole damage (see *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244 following *Dingle v Associated Newspapers Ltd & Ors* [1961] 2 QB 162 and *Drinkwater & Anor v Kimber* [1932] QB 281). This means that all that the plaintiff had to prove was some negligence against the defendant to recover 100% of its claim. For the reasons given above, I found that the plaintiff had proved negligence and breach of contractual duties on the part of the defendant and had thereby contributed to the contamination of the Lorol cargo of the plaintiff. The plaintiff was entitled to recover its claim against the defendant based on 100% with interest as pleaded and the costs of action to be taxed unless agreed.

[87] As for the claim of the defendant against the third party I found them equally to blame. This meant apportionment of blame at 50:50 between them. The apportionment between them was to be made based on the total loss suffered by the plaintiff less the mitigated amount, if any. The balance would be the actual loss of the plaintiff. I further ordered that the defendant and the third party bore their own costs of the third party proceedings.

[88] Accordingly, the case was remitted to the senior assistant registrar for assessment of damages.

Plaintiff's claim against defendant allowed with costs and defendant's claim against third party allowed in part.

Reported by Kanesh Sundrum